No. 94-1706

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE MILL, a limited partnership,
Petitioner,
vs.
STATE OF COLORADO, DEPARTMENT OF HEALTH, and THE TREASURER FOR GUNNISON COUNTY, COLORADO,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF IN OPPOSITION FOR RESPONDENT STATE OF COLORADO TO THE MILL'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the issue of how to value property condemned under the Uranium Mill Tailings Radiation Control Act of 1978 an important and unresolved federal question warranting review by this Court?

2. Was the decision of the Colorado Supreme Court on regulatory takings consistent with decisions of this Court and the federal courts of appeal?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

DECISION BELOW 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 9

I. HOW TO VALUE PROPERTY CONDEMNED UNDER UMTRCA IS WELL-SETTLED. 10

II. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT CONFLICT WITH THE REGULATORY TAKINGS DECISIONS OF THIS COURT OR THE U.S. COURT OF APPEALS. 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES **PAGE**

City and County of Denver v. Smith, 152 Colo. 227, 381 P.2d 269 (1963) 12

Concrete Pipe and Products of California v. Construction Laborers Pension Trust, ___ U.S. ___, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) 22

Department of Health v. Hecla Mining Co., 781 P.2d 122 (Colo. App. 1989) 9

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 18, 23

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 19, 20

Kerr v. South Park Commissioners, 117 U.S. 379 (1886) 12

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) 22, 23

Lucas v. South Carolina Coastal Council, ____ U.S. ____, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) 9, 10, 19-21

Olson v. United States, 292 U.S. 246 (1934) 18

TABLE OF AUTHORITIES

CASES **PAGE**

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 10, 19-21

Shoemaker v. United States, 147 U.S. 282 (1893) 12

State of Colorado, Department of Health v. The Mill, 809 P.2d 434 (Colo. 1991) 8

United States v. 320 Acres, 605 F.2d 762 (5th Cir. 1979) 12, 14, 16

United States v. Miller, 317 U.S. 369 (1943) 16, 18

United States v. Reynolds, 397 U.S. 14 (1970) 16

STATUTES

42 U.S.C. § 4651(3) 11

42 U.S.C. § 4655 11

42 U.S.C. § 7912 5

42 U.S.C. § 7913(c)(1) 11

42 U.S.C. § 7914(a) 8, 11

42 U.S.C. § 7922 15

TABLE OF AUTHORITIES

STATUTES **PAGE**

42 U.S.C. § 7923 15

42 U.S.C. §§ 7901 to 7942 . . . . . 2, 5

Colo. Rev. Stat. § 25-11-303(d)(III) (1989) 8, 11

RULES

33 Fed. Reg. 24 (1968) 3

Rules of the Supreme Court of the United States 15.1 15

OTHER AUTHORITIES

2A Nichols, *The Law of Eminent Domain*, § 7.029[2] (Rev. 3rd Ed. 1993) 17

1978 U.S.C.C.A.N., pp. 7434, 7455, 7461, 7464, 7465 . . . . . 4, 11, 15

H.R. Rep. No. 1480 I and II, 95th Cong., 2d Sess. (1978), *reprinted* in 1978 U.S. Code Congressional Administrative News, Vol. 6, pp. 7433-7478 2

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DECISION BELOW

The relevant decision of the Colorado Supreme Court is reported at 887 P.2d 993 (Colo. 1994). That decision is reproduced in Petitioner's Petition for Writ of Certiorari as Appendix A (pp. 1-51). References to it are cited herein as "Mill Appendix, p. ____."

STATUTORY PROVISION INVOLVED

Petitioner ("The Mill") has appended most relevant statutory provisions to its Petition for Writ of Certiorari.

Two additional provisions of the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA"), 42 U.S.C. §§ 7901 to 7942 that are relevant to the Petition are not included in The Mill's appendices. They are attached hereto as Appendix A. References to the provisions appended by The Mill are cited herein as "Mill Appendix, p. ____." The legislative history of UMTRCA, which is also relevant to the Petition, is found at H.R. Rep. No. 1480 I and II, 95th Cong., 2d Sess. (1978), *reprinted* in 1978 U.S. Code Congressional Administrative News, Vol. 6, pp. 7433-7478 and is cited herein as "1978 U.S.C.C.A.N., p. ____."

STATEMENT OF THE CASE

This case is actually two cases that were consolidated in the Colorado Court of Appeals. The first of these cases concerns a regulatory takings claim asserted by The Mill against Colorado in 1987. The second is an action by Colorado in 1989 to condemn The Mill's property pursuant to its eminent domain authority. Although both cases concern the same parcel of property, they involve distinct legal issues and rest upon different facts. The takings case involves the concept of regulatory takings, whereas the eminent domain case is strictly one of statutory construction and involves the eminent domain concepts of fair market and enhanced value.

The property at issue is located in Gunnison County, Colorado.[1] During the 1950's and early 1960's, the property was used by the Kermac Nuclear Fuels Corporation to

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[1] The Mill's assertion that the property in question is industrially-zoned (Petition, p. 3) is contradicted by the testimony of its own witness that the property was "unzoned." (r. v. IV, p. 377).

mill uranium ore for sale to the U.S. government. Milling operations were conducted pursuant to a U.S. Atomic Energy Commission ("AEC") license which authorized possession of uranium ore. Milling operations ceased in 1962 and the property has been contaminated with radioactive mill tailings ever since.[2] However, the nature and extent of this contamination, and its threat to public health and safety, did not become known for another 15 to 20 years after milling operations ceased (r. v. II, p. 59; v. III, pp. 234-237; v. VI, pp. 791-795, 812, 897; Exhibit 35).

When Kermac sold the property to Colorado Ventures in 1964, the AEC issued a new license to Colorado Ventures authorizing only possession and storage of contaminated buildings and equipment (r. v. II, pp. 56-57). This new license applied only to buildings and equipment and not to the mill yard since it was unknown at the time that contaminated soil in mill yards may also pose a threat to public health and safety (r. v. II, pp. 56-57).

In 1968, the AEC amended the license to allow sale of the equipment on the condition that it was sufficiently decontaminated in accordance with then-existing AEC standards (r. v. II, pp. 57-58). Also in 1968, authority over the license was transferred to Colorado when the AEC authorized Colorado to regulate materials previously regulated by the AEC. Agreement Regarding Discontinuance of Certain Commission Regulatory Authority and Responsibility Within The State, 33 Fed. Reg. 24 (1968). Prior to that time, the State of Colorado had established regulatory authority over other types of radioactive materials. As a

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[2] Radioactive waste from the milling process, called mill tailings, were deposited on the property in a large pile covering about 35 acres. The tailings pile has always been licensed and is not an issue in this case (r. v. I, p. 153).

result, by 1968, Colorado had full regulatory authority over all radioactive materials except those reserved to the exclusive jurisdiction of the federal government, namely fissionable materials used in weapons and power generation. *Id.*

In 1971, Colorado Ventures sought to have its license terminated after certifying to Colorado that the buildings and equipment had been decontaminated to standards prevailing at the time (r. v. III, pp. 876-877, 895; Exhibit JJ). In response, Colorado terminated the license.[3] Use of the mill yard (which was not licensed) and buildings was thus unrestricted (r. v. II, p. 58; v. VII, p. 934). At the time the license was terminated, radiation standards primarily concerned only alpha radiation; scientists did not recognize the harmful potential of other forms of radiation, such as gamma and beta radiation, for many more years (r. v. I, p. 148; v. II, pp. 72-80, 86).

The Mill purchased the property in 1973. This was about the same time that the attention of health officials turned towards radioactively-contaminated soil and mill tailings (r. v. VI, p. 845; v. VII, pp. 861-862, 891-892). Studies showed that uranium mill yards and tailings, once thought harmless, were a serious health threat. 1978 U.S.C.C.A.N., pp. 7434, 7455.

Radioactive contamination was found throughout the mill yard by the Colorado Department of Health ("CDH") in 1976. CDH gave The Mill a report detailing these findings (r. v. II, p. 82; v. III, pp. 178, 234-237, 282; Exhibit OO)

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[3] Petitioner incorrectly states in its Petition that Colorado terminated the regulations (as distinguished from the license) (Petition, pp. i, 21). This is a critical distinction because the underlying regulations and authority were never terminated.

and advised The Mill to take precautionary measures as a result.

The health hazards posed by uranium mills and mill tailings became so apparent that Congress enacted UMTRCA in 1978. The express purpose of UMTRCA was to protect the public health and safety from the hazards associated with uranium mills. This purpose was carried out by providing for the decontamination, at state and federal expense, of 22 specifically-identified inactive uranium mill sites across the country. 42 U.S.C. §§ 7901, 7912. Congress designated the entire mill site at issue in this case, along with eight other sites in Colorado, for cleanup under UMTRCA. *Id.*

Radioactive contamination in the mill yard and buildings was confirmed by CDH in 1980 and 1982, and CDH again apprised The Mill of these findings (r. v. II, p. 59; v. III, p. 137; v. VI, pp. 769-770; 798-799).

With the knowledge of radioactive contamination in the mill yard and buildings, The Mill in 1983 leased part of the property to O.C. Coal Company. O.C. Coal intended to use the site to store coal for sale (r. v. III, pp. 210, 215). Although The Mill informed O.C. Coal of the property's designation under UMTRCA, it assured O.C. Coal that there were no contamination problems in the mill building (r. v. VI, p. 801).

The Mill notified Colorado of the lease with O.C. Coal one month after it was signed (Exhibit 10). Colorado responded to this notice with correspondence advising The Mill and O.C. Coal as to precautions that should be taken in view of the property's contamination (Exhibits 14, 18).

This correspondence prompted a meeting between The Mill, O.C. Coal, and representatives of CDH, wherein CDH's recommendations on safe use of the property were

discussed. As a result of this meeting, The Mill and O.C. Coal agreed to Colorado's recommendations (r. v. III, pp. 185-186, 226-228; v. VII, p. 907; Exhibit 12). For example, The Mill and O.C. Coal agreed to avoid mixing coal with contaminated soil, and to ventilate the buildings to avoid the build up of radon, a carcinogenic gas produced by the decay of uranium (Exhibit 12; r. v. VI, pp. 821-22, 826-27; v. VII, pp. 863, 898).[4] CDH reduced the agreement to writing and sent it to The Mill and O.C. Coal. The Mill then instructed its lessee, O.C. Coal, to follow the agreement and later informed Colorado that the agreement had been implemented (Exhibits F, G, H).

O.C. Coal broke the lease shortly thereafter for a variety of reasons, including a coal fire in the building, litigation over its business, a depressed local economy, conflicts with other tenants, imprudent business decisions,

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[4] The Mill's representation that by these recommendations, Colorado "restricted" use of any portion of the mill yard outside the building to a "50-foot strip" of ground (Petition, p. 7) is misleading for two reasons. First, the recommendations were not "restrictions" on the property, as The Mill implicitly acknowledges in its Petition (p. 6, footnote 3). Before trial, The Mill stipulated that the recommendations were "guidelines", and at trial one of The Mill partners testified he did not regard the recommendations as regulatory or compulsory (r. v. II, p. 60; r. v. VII, p. 972). Second, the pertinent portion of the document from which this statement comes and which describes areas of the mill yard free from contamination suggests an area much larger than fifty feet: ". . . a strip along the east fence approximately 50 feet wide and *widening to include all of the area* east of the office building at the north end" (Exhibit 16) (emphasis added).

and dilapidated conditions of the buildings[5] (r. v. II, pp. 168-169; v. III, pp. 187, 219-220; v. IV, pp. 384, 401; v. V, pp. 563-579; v. VI, pp. 739-742, 746-748, 767).

Not until O.C. Coal (which was now insolvent) broke the lease did The Mill find fault with Colorado's recommendations on safe use of the property. After first accusing the federal government of causing the loss of value of its property (r. v. III, p. 197; Exhibit K), The Mill then blamed Colorado for causing the lease to fail and sued for, *inter alia*, regulatory taking and inverse condemnation. For the first time The Mill began characterizing as "restrictions" the recommendations to which it had previously agreed.

At trial O.C. Coal testified that the recommendations on safe use of the property that it and The Mill had previously agreed to did not materially contribute to the failure of the lease (r. v. II, p. 231). This testimony was corroborated by the testimony of one of The Mill's own witnesses *and* its property manager, both of whom testified that the lease failed because it was inconsistent with prevailing market conditions (r. v. IV, pp. 384, 401; v. VI, pp. 746-749). Despite this, and despite the fact that the trial court found that the contamination on the property was a compelling public health hazard that rendered it "dangerous" and "not safe for public access" (Mill Appendix, pp. 131, 135), the trial court, after dismissing the inverse condemnation claim, found against the state on the regulatory takings claim. The court made this finding despite the fact that before, during, and after trial on the takings claim, The Mill continued to

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[5] The Mill says that its property was "improved" with a mill building and an office building (Petition, p. 3). In fact, the buildings were so dilapidated that the trial court felt they had no value at all (Mill Appendix, p. 142).

earn rental income from other tenants leasing the property.[6]

Colorado appealed the judgment on the takings claim and The Mill appealed the dismissal of its inverse condemnation claim. Ultimately, the Colorado Supreme Court affirmed the dismissal of the inverse condemnation claim and remanded the case for consideration of the regulatory takings claim and the state's defenses to it. *State of Colorado, Department of Health v. The Mill*, 809 P.2d 434 (Colo. 1991) (Mill Appendix, pp. 93-108).

During the pendency of the appeal of the regulatory takings issue, Colorado began an action to condemn the property in accordance with UMTRCA § 7914 and the state statute authorizing Colorado to participate in the implementation of UMTRCA (Colo. Rev. Stat. § 25-11-303(d)(III) (1989).

In lieu of an immediate possession hearing, by which Colorado could take possession of the property prior to a determination of just compensation, Colorado and The Mill stipulated that the property's contamination rendered its fair market value at zero ($0.00) and that Colorado's condemnation of the property was for a valid public purpose (Mill Appendix, pp. 155-157). There being no issues left for the trial court's determination, Colorado's motion that it be vested with title to the property was granted.

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[6] The Mill repeats in its Petition a mathematical error by the trial court (Petition, p. 7 n.4). In ruling against the state on the takings claim, the trial court stated that the taxes on the property ($5,000/year) exceeded the remaining rental income of the property ($500 to $700/month). A simple calculation shows this to be in error: $500 x 12 = $6,000.

The Mill appealed two collateral procedural issues in the eminent domain case. This appeal was consolidated by the Colorado Court of Appeals with the regulatory takings case remanded by the Colorado Supreme Court.

Declining to follow one of its own cases directly on point (and by the same judge) *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo. App. 1989), (*cert. denied*), the Colorado Court of Appeals ruled in the eminent domain case that property condemned under UMTRCA had to be valued *as if* it was not contaminated. In the regulatory takings case, the court ruled that Colorado had effected a regulatory taking of the property (Mill Appendix, pp. 52-76). The Colorado Supreme Court granted certiorari and reversed the Colorado Court of Appeals on both issues. The Mill now seeks this Court's review of the Colorado Supreme Court's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

The Mill attempts to portray the two issues in these consolidated cases as having national significance. The Mill does so by merging them artificially together and then by misstating their legal impact. In reality, there are two simple issues that do not deserve Supreme Court review. The first is whether the issue of how to value property condemned under UMTRCA is an important and unresolved federal issue. The second is whether the Colorado Supreme Court, under this Court's decision in *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), erred in applying state nuisance and property law to The Mill's takings claim.

The issue in the eminent domain case of how to value property condemned under UMTRCA is well-settled under federal law and relevant decisions of this Court; there is no open question under current law.

There is no real issue presented in the regulatory takings case that is deserving of Supreme Court review. The decision of the Colorado Supreme Court does not conflict with any decisions of this Court or any decisions of the United States Courts of Appeal and does not present an important question for this Court. The Colorado Supreme Court applied this Court's decisions in *Lucas* and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) in a logical and unexceptional manner based on the facts before it.

I. HOW TO VALUE PROPERTY CONDEMNED UNDER UMTRCA IS WELL-SETTLED.

A. Application of the Rule Against Enhanced Value to Condemnations Under UMTRCA has been Resolved by Congress and is a Long-standing Doctrine in Federal Case Law.

The Mill argues in the eminent domain case that the Colorado Supreme Court erred in its valuation of The Mill's property. Specifically, The Mill argues that the rule against enhanced value should not be applied to condemnations under UMTRCA. The rule against enhanced value requires that, when determining the value of property being condemned, any increase in value caused by the project for which the property is condemned shall be disregarded. By this argument, The Mill is thus proposing that the govern-

ment pay for the decontamination of its property *and* also pay The Mill the increased value of the property caused by its decontamination.

Congress directed that sites designated in UMTRCA for decontamination be acquired by a participating state when necessary to prevent "windfall profits." 42 U.S.C. § 7913(c)(1) and § 7914(a); Mill Appendix, pp. 166-67. By this requirement, Congress intended to avoid the situation where the taxpayers pay for cleanup of property and the owner of the property unfairly receives the value of the decontaminated property by retaining it.

Where acquisition by eminent domain is necessary, Congress intended that state eminent domain law be followed. 1978 U.S.C.C.A.N., p. 7464. In Colorado, state eminent domain law includes a provision against enhanced value, and when it agreed to participate in UMTRCA, the Colorado legislature directed that acquisitions under UMTRCA be in accordance with Colorado's statutory version of the enhanced value rule (Colo. Rev. Stat. § 25-11-303(d)(III) (1989 Repl. Vol.); Mill Appendix, pp. 158-159).

Not only has Colorado included the prohibition against enhanced value in its laws, it is required by federal law to have such a provision in order to receive federal assistance under programs like UMTRCA. 42 U.S.C. § 4655 (Appendix B, pp. B-4-5). Consequently, Colorado's statutory version of the enhanced value rule is virtually identical to the federal rule against enhanced value. 42 U.S.C. § 4651(3) (Appendix B, pp. B-1-2). Compare Mill Appendix, p. 161.

Thus, UMTRCA requires compliance with state eminent domain law, and the statute authorizing Colorado to participate in UMTRCA specifically references Colorado's statute

against enhanced value. That statute, in turn, is a requirement of federal law.

The federal law prohibiting enhanced value was adopted by Congress in 1971, well before UMTRCA took effect. Although it could have done so, Congress did not exempt UMTRCA from this (or the state's) enhanced value statute when it enacted the law in 1978.

The prohibition against enhanced value is well established in federal case law as well. *United States v. 320 Acres*, 605 F.2d 762 (5th Cir. 1979). It derives from two U.S. Supreme Court cases that date to the late 1800's. *Id.*, at 784. *Kerr v. South Park Commissioners*, 117 U.S. 379 (1886); *Shoemaker v. United States*, 147 U.S. 282 (1893).

There is no unsettled issue as to whether the rule against enhanced value applies when determining the value of property condemned under UMTRCA. Therefore, there is no question that should be resolved by this Court. The rule is a matter of federal and state law, and it plainly applies to condemnations under UMTRCA. It is undisputed that Congress intended acquisitions under UMTRCA to comply with state law, and in Colorado (as well as in federal law) the enhanced value rule is so clearly the law that merely quoting it is sufficient. *City and County of Denver v. Smith*, 152 Colo. 227, 381 P.2d 269 (1963). The Mill's depiction of Colorado's statute on enhanced value as a quirk in state law that is repugnant to UMTRCA is in itself erroneous.

B. The Mill's Arguments on How to Value Its Property are Based Upon Misinterpretations of UMTRCA.

In an attempt to escape the enhanced value rule, The Mill offers several interpretations of UMTRCA designed to allow the award of enhanced value to The Mill. None of The Mill's interpretations have any merit and all must be rejected. In addition to the failure to present a meritorious argument, The Mill fails to raise an issue which this Court should address.

In furtherance of its argument that it is entitled to both government decontamination of its property *and* to value enhanced by its decontamination, The Mill argues that although Congress intended to prevent windfall profits, the term "windfall profits" does not refer to enhanced value. Rather, The Mill argues that the term refers to the cost of decontamination. Thus, according to The Mill, Congress did not intend to prevent enhanced value. The Colorado Supreme Court rejected this argument and concluded that the increase in a property's value caused by its decontamination under UMTRCA was a "windfall profit." (Mill Appendix, p. 25). Thus, reaping an unearned and government-funded increase in value was exactly what Congress sought to avoid by requiring acquisition of property to be decontaminated when necessary to prevent windfall profits. *Every* UMTRCA site will have decontamination consts. It makes no sense, then, for The Mill to argue that Congress would prohibit windfall profits in one part of a statute and require it in the form of enhanced value in another part of the same statute. The Mill's interpretation of UMTRCA equating the term windfall profits with decontamination cost thus renders Congress' attempt to prevent windfall profits meaningless.

As The Mill notes, the term "windfall profits" is not defined in UMTRCA or its legislative history. Thus, the

Colorado Supreme Court did what any other court would have done in this situation: it gave the term its commonly understood meaning (Mill Appendix, p. 25). Resort to the commonly understood meaning of an undefined statutory term is a normal judicial function. Further, the court's resultant definition of the term "windfall profit" is in fact consistent with federal court interpretations of the term "windfall." In *United States v. 320 Acres*, 605 F.2d 762 (5th Cir. 1979), the circuit court of appeals termed government-conferred, enhanced value, a "windfall." 605 F.2d at 782.

The Mill's argument that the term "windfall profit" refers to the cost of decontamination and not enhanced value must be rejected as inconsistent with the plain language of the statue (Mill Appendix, p. 24).

The Mill's suggestion that it is entitled to enhanced value because decontamination is an inherent aspect of the property is also without merit. The Mill argues that UMTRCA's "overriding intent" is that DOE has a firm obligation to decontaminate every UMTRCA-designated site (Mill Petition, p. 18). Therefore, according to The Mill, enhanced value is not a windfall profit. On the contrary, although Congress undoubtedly intended that DOE fully implement and complete the remedial program created by UMTRCA, it expressly conditioned continuation of the program on annual appropriations and authorization:

> The authority under this title . . . requiring the United States to make outlays may be exercised only to the extent provided in advance in annual authorization and appropriation acts.

42 U.S.C. § 7923; Appendix A. *See also* 42 U.S.C. § 7922, Appendix A.[7] If Congress cut off funds for or terminated UMTRCA tomorrow, The Mill would have no right whatsoever to compel the cleanup of the property. The 'overriding intent' of UMTRCA is to decontaminate these properties, but in a manner that minimizes the costs to the public. 1978 U.S.C.C.A.N., pp. 7461, 7465. Thus, The Mill cannot argue that it is entitled to enhanced value merely because every property must be decontaminated.

This Court should not grant a Writ of Certiorari based upon The Mill's misinterpretation of UMTRCA. Supreme Court Rule 15.1.

C. The Mill has not Provided a Valid Reason for Departing from the Fair Market Value Rule.

The Colorado Supreme Court held that the fair market value rule requires exclusion of enhanced value. Mill Appendix, p. 17. In another effort to escape the prohibition against enhanced value, The Mill argues that, under the Just Compensation Clause, deviation from the normal fair market value rule is warranted if application of the rule results in manifest injustice. Citing what it calls the "extreme inequity" of the rule against enhanced value, The Mill argues this is such a case and, therefore, the court below should have deviated from the fair market value rule by disregarding its enhanced value component. In effect, The Mill is arguing that it will suffer a manifest injustice unless its property is

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[7] These two sections of UMTRCA were not included in Appendix L to The Mill's Petition.

decontaminated *and* it is awarded a bonus in the form of publically-funded enhanced value.[8]

The fallacy of this argument is patently obvious, and ignores the fact that the Just Compensation Clause requires fairness and equity to the owner *and* the public, *United States v. 320 Acres*, 605 F.2d at 780, and that the enhanced value rule is designed to prevent manifest injustice to the public in the form of *over*compensation. *Id.* at 781-782 (emphasis added). Thus, the rule is to prevent owners such as The Mill from extracting, under compulsion of the Just Compensation Clause, profits that result from the government's action. *Id.* at 786.

Value attributable to the government's project is not just compensation, *United States v. Reynolds*, 397 U. S. 14 (1970); *see also United States v. Miller*, 317 U.S. 369 (1943), and *United States v. 320 Acres*, *supra* at 782-783, and enhanced value is a prime example of overcompensation. The Mill's argument that the Colorado Supreme Court should have deviated from the fair market value rule in a manner that awards The Mill the value of its property as enhanced by the decontamination project for which it was condemned is thus contrary to federal law and this Court's decisions in *United States v. Reynolds* and *United States v. Miller*, *supra*.

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[8] The Mill bases this argument in part upon the fact that it received nothing for its property. The Mill makes this argument despite the fact that it stipulated to the property's fair market value as zero dollars (because the costs to decontaminate the property exceeded its fair market value even if it was uncontaminated). Further, if property has no value, the Just Compensation Clause does not require the court to ignore reality and order compensation regardless. *United States v. 320 Acres*, *supra* at 820 n.131.

The Mill offers other arguments as to why the fair market value rule should not be followed in this case, but none of these arguments have any merit and do not deserve the attention of this Court.

For example, endeavoring to avoid the enhanced value rule, The Mill argues that condemnations under UMTRCA are unique because they are for a public purpose rather than a public improvement. Therefore, The Mill argues, the normal fair market value rule should not be followed in condemnations under UMTRCA. There is no distinction in the law between condemnations for public purposes and for public improvements. 2A Nichols, *The Law of Eminent Domain*, § 7.029[2] (Rev. 3rd Ed. 1993). This explains why The Mill provides no citation to authority to support this argument. Further, The Mill has provided no explanation (other than its own one-sided view of fairness) why condemnations under UMTRCA should not be treated like any other condemnation. On the contrary, by its unqualified deferral to state eminent domain law, Congress clearly intended that such condemnations be treated like any other.

Moreover, merely because Congress did not specify in UMTRCA that any particular method to measure just compensation be used does not in itself justify deviation from the normal fair market value rule. If Congress had intended the result sought by The Mill (decontamination *and* enhanced value), it could have easily provided as much. No such intent on the part of Congress can be found in UMTRCA. Congress *did* direct that state eminent domain law be followed when acquiring property under UMTRCA, and state law clearly requires application of the fair market and enhanced value rules. To hold otherwise would impute an intent on the part of Congress that is not apparent or implied.

Finally, the Court should reject The Mill's argument that the Just Compensation Clause requires deviation from the fair market value rule in order to put The Mill in as good a position as if the property were not condemned. The Just Compensation Clause does require a property owner to be put in as good a position as if the property were not condemned, *United States v. Miller*, *supra*, but not more *Olson v. United States*, 292 U.S. 246, 255 (1934). By arguing for enhanced value through a deviation from the fair market value rule, the Mill is seeking to be overcompensated. Moreover, The Mill glosses over the fact that it *is* in as good of a position - if not better - as a result of the condemnation of its property under UMTRCA: the property has no value, and The Mill consequently has lost nothing, yet The Mill has been relieved of an enormous potential remedial liability by virtue of the state's acquisition (Mill Appendix, p. 34 n.16). It is ironic that The Mill nonetheless is seeking enhanced value of its property.[9]

Clearly, the usual rules for determining just compensation, including the fair market and enhanced value rules, apply to condemnations under UMTRCA, and how to value property condemned under UMTRCA is not an unresolved issue nor an important federal question. The Petition should, therefore, be denied.

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[9] "When there is reciprocity of advantage, then the claim that the government has taken property has little force." *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

II. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT CONFLICT WITH THE REGULATORY TAKINGS DECISIONS OF THIS COURT OR THE U.S. COURT OF APPEALS.

A. This Case Does Not Present A Takings Issue That is Properly Resolved By This Court.

The Mill also fails to present an issue worthy of this Court's review in the regulatory takings case. The Mill's suggestion that this case presents an opportunity for this Court to define the scope of the nuisance defense under *Lucas* must be rejected. Background principles of nuisance and property law are a matter of state law, *Lucas*, 112 S. Ct. at 2900, and this Court has repeatedly "eschewed any 'set formula' for determining [when a regulation goes] too far; it is essentially an *ad hoc*, factual determination." *Lucas*, 112 S. Ct. at 2893; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The scope of state nuisance and property law is thus an issue for state courts. *Ruckelshaus v. Monsanto*, 467 U.S. at 1001; *Lucas*, 112 S. Ct. at 2901. The Colorado Supreme Court's assessment of the state's nuisance, property, and regulatory law in effect when The Mill took title to the property is not an issue for this Court to determine.

Furthermore, it is unnecessary to decide the takings issue here because, by any standard, the activities involved in this case constitute a nuisance under *Lucas*.

B. The Colorado Supreme Court's Decision in This Case is Fully Consistent with This Court's Decisions in *Lucas v. South Carolina Coastal Council* and *Ruckelshaus v. Monsanto*, as well as Federal Circuit Court Decisions.

The Mill attempts to create an important regulatory takings issue out of a case that raises none. The Mill argues that the Colorado Supreme Court erred in finding that The Mill's investment-backed expectations were unreasonable. On the contrary, the court below relied squarely upon Supreme Court decisions for this determination.

The Mill is incorrect in asserting that *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S Ct. 2886 (1992) left open the issue of whether investment-backed expectations are subject to subsequent regulation pursuant to existing authority (Mill Petition, p. 21). This issue was squarely addressed in *Lucas* where this court held that it was open to the state to make the implications of its background principles of nuisance and property law explicit *at any point*. 112 S. Ct. at 2901 (emphasis added).

Likewise, there is no basis for the argument that the Colorado Supreme Court's decision was "flawed" because it "engrafted" the nuisance exception in *Lucas* onto the determination of an owner's investment-backed expectations (Mill Petition, p. 27). Uses that are forbidden under common law are not a part of an owner's "bundle of rights," *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and as this Court stated in *Lucas*, an owner's investment-backed expectations necessarily are determined in large part by an analysis of existing property and nuisance law: no compensation is due if [such] limitations . . . inhere in the title itself, in the restrictions that background principles of . . .

nuisance and property law already place upon such land ownership." *Lucas*, 112 S. Ct. at 2900.

Neither is there any merit to The Mill's argument that the Colorado Supreme Court erred in relying on this Court's decision in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) when it ruled that The Mill's investment-backed expectations were unreasonable. In *Monsanto*, which delt with the issue of whether a taking of commercial property (trade secrets) was compensable under the Fifth Amendment, this Court held that an analysis of an owner's investment-backed expectations may overwhelm the other two factors in a takings claim (character of the government's action and economic impact) so as to dispose of the takings claim. 467 U.S. at 1005. Quoting *Monsanto,* the Colorado Supreme Court held that The Mill's expectation that it could use radioactively contaminated property free from any regulation was so unreasonable that further inquiry into the takings claim was not necessary. Although not clear, The Mill apparently argues (without elaboration or citation to authority) that *Monsanto* is limited to trade secrets (commercial personal property) cases. Nothing in *Monsanto* limits this holding to personal property. Furthermore, since the definition of property for purposes of the Fifth Amendment is a matter of state law, *Monsanto*, 467 U.S. at 1001; *Lucas*, 112 S. Ct. at 2901, the Colorado Supreme Court's decision to apply the rule in *Monsanto* to heavily regulated activities on real property such as The Mill's as this Court did to commercial personal property in *Monsanto* does not conflict with *Monsanto* and does not raise a federal question.

There is nothing exceptional with the Colorado Supreme Court's application of *Lucas* and *Monsanto* to the facts of his case. Of the hundreds of cases applying *Lucas* and *Monsanto*, The Mill has failed to demonstrate why this one warrants this court's review.

Neither is there a conflict with federal circuit court decisions. The Mill attempts to portray the Colorado Supreme Court's decision as contrary to *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), but the argument is simply spurious. The Mill argues that since Colorado terminated the license on the mill buildings, a fact which The Mill gleaned from the state's files, the Colorado court erred in determining that Colorado's nuisance law precluded its takings claim. Thus, The Mill cites *Loveladies* for the proposition that, "nothing in [the State's] *files* . . . reflected a . . . determination that certain activities would violate Colorado's understanding of its nuisance powers." By this argument The Mill is blatantly mischaracterizing *Loveladies*. The court in *Loveladies* said it is the State's *conduct* -- not merely its files -- that reflects the State's understanding of its nuisance laws. 28 F.3d at 1183. Quoting this Court in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*, ___ U.S. ___, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), the Court in *Loveladies* stated that the regulatory regime in existence at the time the owner took title was determinative of whether an owner's investment-backed expectations were reasonable. *Loveladies*, 28 F.3d at 1177. Thus, it is not the state's files on The Mill's property that reflect the state's understanding of it authority under nuisance law, but it is the law in effect at the time The Mill became the owner of the property.

Therefore, the Colorado Supreme Court's determination that The Mill's takings claim was precluded by reason of the extensive body of law regarding nuisances and radioactive materials in effect in Colorado when The Mill took title to the property (which was set forth by the Colorado Supreme Court in meticulous detail, *see* Mill Appendix, pp. 11-16, and which is not disputed by The Mill) is fully consistent with the federal circuit court's decision in *Loveladies*.

Finally, a critical fact distinguishes the results in *Loveladies* from the results in this case: unlike The Mill, the plaintiff in *Loveladies* purchased the property *before* the authority to regulate the property was established.

C. There is no Conflict Between the Decision of the Colorado Supreme Court and Decisions of the Federal Circuit Court of Appeals.

The Mill is also mistaken in its claim that the Colorado Supreme Court's failure to find a partial taking conflicts with *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (Mill Petition, p. 25). The Colorado Supreme Court *did* acknowledge that a partial taking could be compensable (if the regulation went "too far") (Mill Appendix, pp. 8-9). Thus, the very premise of The Mill's argument - that the Colorado Supreme Court rejected the notion of a partial taking - is simply wrong and the argument must be disregarded. There is no conflict whatsoever between the decision of the Colorado Supreme Court and *Florida Rock Industries* despite The Mill's attempts to create one.

CONCLUSION

The decision of the Colorado Supreme Court in this case does not present any unresolved important federal question nor any conflicts with federal law. The Colorado Supreme Court applied federal and state statutory and case law in a proper and unremarkable fashion. Accordingly, the Petition for Writ of Certiorari should be denied.

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APPENDIX A

URANIUM MILL TAILINGS RADIATION CONTROL ACT [42 U.S.C.]

§ 7922. Termination of authority of Secretary; extension of authority; annual Department of Energy authorizations; appropriations available for expenditure

(a) The authority of the Secretary to perform remedial action under this title shall terminate on the date seven years after the date of promulgation by the Administrator of general standards applicable to such remedial action unless such termination date is specifically extended by an Act of Congress enacted after the date of enactment of this Act.

(b) The amounts authorized to be appropriated to carry out the purposes of this title by the Secretary, the Administrator, the Commission, and the Secretary of the Interior shall not exceed such amounts as are established in annual authorization Acts for fiscal year 1979 and each fiscal year thereafter applicable to the Department of Energy. Any sums appropriated for the purposes of this title shall be available until expended.

§ 7923. Limitation of contractual authority

The authority under this title to enter into contracts or other obligations requiring the United States to make outlays may be exercised only to the extent provided in advance in annual authorization and appropriation Acts.

APPENDIX B

UNIFORM REAL PROPERTY ACQUISITION POLICY [42 U.S.C.]

§ 4651. Uniform policy on real property acquisition practices

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representatives shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In

no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 1 of the Act of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a), for benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by title II will be available), or to move his business or farm operation,

without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property of a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this Act, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency

concerned has determined has little or no value or utility to the owner.

(10) A person whose real property is being acquired in accordance with this title may, after the person has been fully informed of his right to receive just compensation for such property, donate such property, and part thereof, any interest therein, or any compensation paid therefor to a Federal agency, as such person shall determine.

* * * *

§ 4655. Requirements for uniform land acquisition policies; payments of expenses incidental to transfer of real property to State; payment of litigation expenses in certain cases

(a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after the effective date of this title [enacted Jan. 2, 1971], unless he receives satisfactory assurances from such acquiring agency that -

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 301 [42 USCS § 4651] and the provisions of section 302 [42 USCS § 4652], and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 303 and 304 [42 USCS §§ 4653 and 4654].

(b) For purposes of this section, the term "acquiring agency" means -

(1) a State agency (as defined in section 101(3) [42 USCS § 4601(3)]) which has the authority to acquire property by eminent domain under State law, and

(2) a State agency or person which does not have such authority, to the extent provided by the head of the lead agency by regulation.